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Whose Public Interest Is It Anyway?: Advice for Altruistic Young Lawyers

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WHOSE PUBLIC INTEREST IS IT ANYWAY?: ADVICE FOR ALTRUISTIC YOUNG LAWYERS

Patricia M. Wald

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WHOSE PUBLIC INTEREST IS IT ANYWAY?: ADVICE FOR ALTRUISTIC YOUNG LAWYERS

*Patricia M. Wald**

I. THE PUBLIC INTEREST LAWYER

A. *The Public Interest Law Movement*

It is by now a ritual for judges and elders of the bar to lecture prospective young lawyers that they should devote a significant part of their career to pro bono work. Pro bono of course is short for pro bono publico—for the good of the public. I can certainly attest from my own forty years in the law that there are great satisfactions in devoting one's skills to a cause larger than money or even professional reputation. But I can also tell you that doing good can be hard work, and that a lifetime of public service requires just as much, probably more, prudence, discretion, judgment, tolerance for frustration, and long-range perspective as for-profit lawyering. Tonight, drawing on my own experiences in three phases of public interest lawyering, I will discuss some of the conflicts and dilemmas nontraditional lawyering poses. I do this—heaven knows—not to discourage would-be novitiates, but to counsel a kind of idealistic realism, to be contrasted with unfocused feel-good notions, about donating one's working life to the great unwashed, certainly the great undefined, public interest out there.

The Bible warns against squandering one's talents profligately. And there are just so many years, just so much energy and commitment in any lawyer's lifetime. A series of tough questions, not all of which I am confident I can answer myself, may help steer those of you interested in public service closer to success, which I define as a sense at the end of your career that you have contributed, commensurate with your talent and skills, to the slow but measured advance of your community and nation toward a more just society.

My first question would be: Why do I want to serve the public interest anyway, reserving for a moment the definition of what that is? In short, what is the source of my altruism? Is it really concern for others or a thin disguise for other less laudable motives—a good résumé (useful for those with political or judicial ambitions) or an opportunity to feel good about myself and superior, even controlling, toward those I serve without pay, a welcome contrast to some to the irritating demands of a paying client. A reviewer of Robert Coles's recent book on altruism commented perceptively, "Among the many forms of human action, few are subject to more misunder-

* Judge, United States Court of Appeals for the District of Columbia Circuit.

standing, cynicism or rancor than the idealistic ventures of volunteers and activists who try to make life better for someone else."¹ In the same vein, Anna Freud once observed:

How sad that in the name of goodness and kindness to others one can see plenty of mean-spirited behavior—a demanding, controlling, manipulative, condescending self-centered ruthlessness that masks itself as good will, as an effort at charity, as an attempt to change the world, reform a given society.²

Others say that the only true altruists are those who perform small anonymous acts of charity in their daily lives, not global reformers. But that kind of selflessness is hard to sustain. Early in my career I did legal services work; after a few years of running to court to stay evictions, seeking child support for bereft mothers, trying to recoup denied welfare benefits, I became a class action/test case junkie, desperately anxious for the single mandate that would spell meaningful relief for the many. Those dedicated young lawyers who do invest many more years affording poor people, children, aliens, and criminal defendants individualized legal help deserve our applause. But many eventually gravitate toward a kind of public interest work that aims at more dramatic changes in laws,³ the so-called public interest segment of the bar, spawned in the 1970s and now claiming over 1000 lawyers in 160 centers throughout the country, financed primarily by individual contributions or foundation grants.⁴

After decades of pro bono practice, no one yet has a sharp or clean definition of public interest law. Years ago, Thurgood Marshall enthused about those lawyers who:

provide representation to a broad range of relatively powerless minorities—for example, to the mentally ill, to children, to the poor of all races. They also represent neglected interests that are widely shared by most of us as consumers, workers, and as individuals in need of privacy and a healthy environment. These lawyers have, I believe, made an impor-

1. E. J. Dionne, Jr., *Making the World a Better Place*, WASH. POST, Oct. 10, 1993 (Book World), at 3 (reviewing Robert Coles, *The Call of Service* (1993)).

2. *Id.* at 7. See also Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U. L. REV. 385 (1992) (tracing roots of altruism in legal profession and application to pro bono activities).

3. See, e.g., Richard C. Reuben, *The Case of a Lifetime*, A.B.A. J. April 1994, at 70 (1994) (detailing pro bono cases that have "shaped the law in important ways"); Debra S. Katz & Lynne Bernabei, *Practising Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293 (1994); Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367 (1994) (review of conflicting notions about lawyer's obligation to serve the needs of the poor).

4. NAN ARON, LIBERTY AND JUSTICE FOR ALL 27 (1989) (158 groups employing 906 lawyers in 1984); BURTON A. WEISBROD ET AL., PUBLIC INTEREST LAW, AN ECONOMIC AND INSTITUTIONAL ANALYSIS 552 (1978) (166 firms employing nearly 1000 lawyers).

tant contribution . . . they have made our legal process work better . . . and, by helping open doors to our legal system, they have moved us a little closer to the ideal of equal justice for all.⁵

And an early public interest lawyer described it this way: "We were doing what [the elite law firm] was doing for corporate clients, except we were doing it for citizens' organizations: for poor people, for civil rights groups, for neighborhood development corporations, for consumer and environmental groups."⁶

That kind of client-oriented definition didn't last long, however, as the young conservatives of the 1980s claimed the mantle of public interest law for themselves as well. Generously supported by corporations, trade associations, conservative constituency groups and foundations, these new recruits did not see their mission as representing the previously unrepresented; to the contrary, they vigorously advocated the case of private developers against land use regulators, opposed limitations on the use of pesticides and fought CAFE standards for automobile emissions. With their arrival on the scene, public interest law could no longer be viewed as a monolithic movement, dedicated to a single political agenda.⁷

This capsulized history raises a second, related question for young lawyers embarked on a public interest career in the private sector. How do I define the "public interest" I so unselfishly want to serve? You can, of course, throw your lot in with a defined constituency group, acting as the legal arm of a larger political or social movement—the Sierra Club, the Legal Defense and Education Fund of the NAACP, the Native Americans Rights Fund, the Women's Law Center, and so on. Lawyering for such groups may not differ that much from private practice; the lawyer is obliged within professional and ethical rules zealously to advocate his clients' causes, as defined by the clients. Although young lawyers representing such groups may get more chances to participate in the policymaking of their constituent organization than private practice counterparts, or to exercise more control over what cases are brought because of funding shortfalls, still, they must decide if the organization's overall goals and priorities are their own. Thus across the legal landscape we see environmentalists opposing Native Americans; labor unionists vying with racial and ethnic minorities and women's advocates; pro-choicers pitted against right-to-lifers, all perceiving themselves as public interest lawyers. In reality, they represent only one of many segments, and that is the reason why their critics so often refer to

5. Justice Thurgood Marshall, Address to the Award of Merit Luncheon of the Bar Activities of the American Bar Association (Aug. 10, 1975).

6. ARON, *supra* note 4, at 87 (quoting Charles Halpern, founder of Center for Law and Social Policy).

7. *Id.* at 74-78.

them, not illogically, as special interest lawyers. Often their claim to the public interest label lies principally in the notion that by representing the unrepresented (when that is true) they legitimize and fortify the basic adversary legal system for settling disputes and obtaining benefits.

This fact of life dictates a considerable degree of humility about one's status as a public interest lawyer; it also dictates care in the selection of causes. Few public interest lawsuits are zero sum games; as in all litigation someone wins and someone loses. But in utilizing the resources of the law to promote the interests of one part of society over another, "special" or "public interest" advocates, however designated, are playing with heavy weapons; they are forcing society's hand on some of the most difficult resource allocation choices it has, weighing in on one side of the scale against other sides.⁸ According to Jack Greenberg, former Director of the NAACP Legal Defense Fund, "You have to strike a balance, and with each case, judge whether the net effect will be better than if the case had not been brought. It's always a judgment call."⁹ What is not clear from Greenberg's statement is whether the "net effect" is calculated according to the client group's interests or the effect on society as a whole. And that, of course, is the conscience always prodding public interest lawyers. Is it enough if I ask whether the case advances my group's special interest, or should I include the harder question of whether society's interests are furthered?

Now in the real world, as practitioners like to call it, young lawyers must initially make a decision that their "comfort level" is high enough with a special group's agenda that they will not need to recalculate the net win/loss ratio for society on each case. But there will come a point in almost every causist's career when a lawsuit looks so skewed or antisocial that she will balk, and if it happens frequently enough, feel compelled to leave. That is the framework within which all conscientious special interest lawyers live. It is a markedly different one from that of the archetypical tobacco lawyer who is asked, as Roger Rosenblatt did recently in the *New York*

8. Some lawyers say the duty to advocate for the best interests of a single client obviates the need to consider how zealous representation may affect society. The classic example of this view is Lord Brougham, a defense lawyer who stated that he was prepared to bring down the kingdom for his client in *Queen Caroline's Case*:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them to himself, is his first and only duty; and in performing that duty he must not regard the alarm, the torments, the destruction which he may bring to others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

2 Trial of Queen Caroline 8 (1821).

9. *Id.* at 108-09.

Times, how he can live with himself,¹⁰ or even that of the nondiscriminating counsel who does not attempt to make any judgments at all about whether he is doing good or bad for society but says, "Let the courts decide."

Why the higher standard for noncommercial lawyers? For one thing, they play for higher stakes, usually not content to reallocate resources from one individual to another, but rather to make government or major economic forces behave in a particular way, to shift resources to benefit one segment of society, usually at the risk of another segment. Although true only as a generalization, blurry at the edges, this responsibility entails harder ethical decisions. On a more personal basis, most lawyers who eschew private practice do so at substantial monetary cost, and their personal self-worth requires that they do a periodic self-audit to determine whether the trade-off continues to be worthwhile.

In the late 1970s, the Ford Foundation commissioned an evaluation of the public interest movement.¹¹ The core inquiry was whether this kind of voluntary not-for-profit lawyering enhanced the general welfare in any quantifiable way. The study asked first: Will a particular lawsuit promote allocative *efficiency*, that is, will it put society's productive resources to their optimum use? Or, alternatively, will it promote allocative *equity* by dividing the fruits of those resources in a more equitable way? Ford concluded, predictably, that most public interest lawsuits fell into the latter category.¹² The study also found that our society has some shared standards of allocative equity by which the legitimacy of these lawsuits can be judged.

[I]t is not equitable for people to live in abject poverty no matter how unproductive they may be; . . . it is not equitable for children to go without medical care and schooling simply because their parents are unproductive in the marketplace; it is not equitable for non-whites, women, the aged, and other easily identified persons to suffer from discrimination whether or not it is privately efficient for employers to base hiring decisions on the low-cost information . . . contained . . . in the knowledge of a worker's color, sex, or age.¹³

The evaluators found, too, that different kinds of lawsuits benefit different sectors of the community. Thus, they said, "[T]he greatest benefits per person from [public interest law] activities in the environmental, consumerism, and voter-information areas accrue to a subset of the population that is extraordinarily well-educated and

10. Roger Rosenblatt, *How Do Tobacco Executives Live With Themselves?*, N.Y. TIMES, March 20, 1994, (Magazine) at 36.

11. WEISBROD, *supra* note 4.

12. *Id.* at 7.

13. *Id.* at 18.

well-off financially, compared with the U.S. population as a whole.”¹⁴ But employment discrimination, education, occupational safety, and health lawsuits produced a different reallocation. For example, thirty class actions brought by the Washington Lawyers Committee for Civil Rights opened up 230,000 additional entry-level or blue-collar jobs for women and minorities.¹⁵

Some other hard truths emerged. Although the authors of the Ford study ultimately concluded the voluntary nonprofit sector efforts of public interest lawyers can in some cases be more efficient in advancing allocative equity standards than either the private sector or government,¹⁶ they also emphasized that judicial victories alone are not always necessary or sufficient to bring about change in private individuals or government officials;¹⁷ that public interest litigation is most valuable when it is undertaken on behalf of interests not normally represented in the governmental decisional processes; and that public interest law successes are limited by funding, lobbying restrictions, conflicts among different interests and, sadly, by a lack of understanding among groups as to where their own best interests lie.¹⁸

Public interest litigation—at the time of the Ford report and, I think, still—is most successful in compelling agencies to enforce existing laws and regulations and in requiring courts or agencies to flesh out crucial “details” of protective legislation that legislators omit. On occasion it paves the way for agency heads to demand more money from legislators to do their job right, and it has sometimes made institutions fundamentally reorient their care-giving functions.¹⁹ But public interest litigation has been severely criticized—not entirely without justification—for slowing down government processes, overburdening the courts, and concentrating on centralized policymaking in Washington, D.C. rather than grassroots program development.²⁰ Disappointingly, even winning decrees take decades of compliance efforts or, more discouraging still, are just plain ignored. Public interest veterans complain, “[We] never expected it would take so long to implement court decisions. It often seems like you never win. Your adversaries keep coming back. You have to constantly fight to win battles you thought were over.”²¹

14. *Id.* at 145.

15. *Id.* at 283.

16. *Id.* at 554.

17. *Id.* at 553-55.

18. *Id.* at 554, 556-58. See also Henry J. Reske, *Ralph Nader's New Project*, A.B.A. J. May 1994, at 32 (new group will work with local community organizations, not individuals, for systemic improvements in housing, public safety, etc.).

19. WEISBROD, *supra* note 4, at 216; ARON, *supra* note 4, at 97.

20. ARON, *supra* note 4, at 105.

21. *Id.* at 107 (quoting Alvin Bronstein and Judith Lichtman).

What conclusions do I expect you to draw from all this? That public interest lawyering is not constantly fulfilling; that trying to play God can be an uncomfortable, even self-doubting role; that in many cases it is simply special interest lawyering; that most public interest lawsuits redistribute resources, rather than add to them; and finally, that lawsuits, perhaps because they are so adversarial, are not always the best way to change behavior, and legal victories can take decades to monitor, as well as induce unanticipated consequences. Judgment-calls on litigation made under financial constraints often involve the least elevated of concerns: what one's staff can do best, which judge will rule on the case, or how much publicity the case will generate for the project.²²

To illustrate these ambiguities, let me talk briefly about two public interest law cases I worked on in the 1970s, one on behalf of handicapped children seeking public education and one to deinstitutionalize St. Elizabeth's Hospital mental patients in Washington, D.C. Both suits were brought (and won) in the early 1970s; both are still active and not yet fully settled in the federal district court in our circuit today, over twenty years later. Both cases raise significant questions about the net effect of the "rights" they established; yet there can be little doubt that both performed catalytic functions in changing the social equities for handicapped children and mentally ill persons. But in both cases you might well ask the question—I have often asked it myself—was the effort enlightened or tunnel-visioned, a net gain or net loss for the public interest?

B. *Special Education*

*Mills v. Board of Education*²³ was a class action brought on behalf of all physically and mentally handicapped, retarded, and emotionally disturbed children ("challenged" children in the current parlance) who had been denied admission to or expelled from the D.C. public schools because of their disabilities. In 1971, when the suit was filed, there were an estimated 22,000 such children in D.C.²⁴ At the time of the suit, less than \$1 million was being spent on the education of handicapped children in D.C. *Mills* was the second such case brought in the nation, the first to encompass physical or emotional disabilities as well as retardation. The plaintiffs, the Center for Law & Social Policy, and the National Legal Aid and Defenders Association, based their suit on D.C. laws and regulations that, we argued, guaranteed an entitlement of a public school education to all children as well as on a constitutional equal protection theory that presupposed education was a basic right that could not be denied a child because of a condition beyond her control.

22. *Id.* at 99.

23. 348 F. Supp. 866 (D.D.C. 1972).

24. *Id.* at 868.

The D.C. Board of Education's opposition to the suit was perfunctory. The corporation counsel relied, rather limply, on the defense that no money from the regular school budget appropriation could be diverted to special education. The trial judge, however, ruled that handicapped children deserved to share in whatever general funds were appropriated for education. He also bought most of our prescription for wide-reaching relief: a guarantee of individualized diagnosis, prescription, and placement within fifty days in an appropriate program for all handicapped children, including those suspended or expelled for disciplinary reasons if the underlying cause was emotional disturbance. These individualized education plans could be challenged by the child's parents in hearings before arbiters from outside the school system, with an eventual appeal to the court.

Following the *Mills* decree, which never was appealed, the system cranked into operation; three hundred hearings were held within the first nineteen months.²⁵ In that time the number of students diagnosed as in need of special education rose 75%, but the special education budget increased by only 25%;²⁶ predictably, complaints abounded that this money was being taken from non-handicapped children. On the other hand, parents of handicapped children thought the hearings were stacked in favor of finding that disabled children could be accommodated in special education programs set up within the school system rather than through subsidized placements in the parent-preferred private programs around the city.

In the mid-1970s, Congress, drawing in substantial part on D.C.'s experience under the *Mills* court decree, passed the Education of the Handicapped Act, later renamed the Individuals with Disabilities Education Act ("IDEA").²⁷ The Act provided needed funding for special education in local school systems and established the kind of individualized placement and hearing requirements already required under *Mills*. The Act stressed what we called "mainstreaming" then (it is called "inclusion" now), the placement of children within the regular classrooms, bolstered with supplementary help if necessary, rather than in segregated programs serving handicapped children only. But a basic conflict was surfacing. In 1974 testimony we warned the House Committee, "There is a real danger that [the] mainstream philosophy can be used as a cover-up for inadequate school programs that do not satisfy these children's real, special education needs."²⁸

25. *Hearings on H.R. 70 Before the Select Subcomm. on Education of House Comm. on Education and Labor*, 93d Cong., 2d Sess. 194 [hereinafter *Education Hearings*] (testimony of Patricia M. Wald).

26. *Id.* at 192.

27. 20 U.S.C. §§ 1400-1485 (1988); Pub. L. No. 102-119, 105 Stat. 587 (renamed 1991).

28. *Education Hearings*, *supra* note 25, at 193.

Almost twenty years later, this problem we foresaw has become the subject of an intense national debate, while the legal concept we fought for in *Mills*, that every handicapped child is entitled to a publicly-supported education suitable to his needs, is universally accepted and firmly settled in statutory law. Financial pressures have skewed the system in the direction of keeping handicapped children in regular classrooms, whatever the nature or condition of their disability. Mainstreaming or inclusion has become not only politically correct but economically necessary. The District of Columbia has been placing more and more of its exceptional children in regular classrooms and has recently closed down the special education school it set up in the wake of *Mills*.²⁹ D.C. school officials are now refusing to pay special education tuition for private placements in all but the most exceptional cases, although judges are still ordering these special placements on behalf of disgruntled parents.³⁰ A *Washington Post* article concluded, "[C]ontrolling tuition costs is part of a larger issue: a bitter feud over whether the District school system is capable of efficiently identifying students who need help and quickly placing them in appropriate programs."³¹ The school system reportedly takes from one to two years from identification to placement, despite the fifty-day deadline on the process mandated by *Mills*. As a result of its tardiness, last year D.C. spent 25% of its special education budget for private boarding school tuition and \$750,000 for attorneys' fees in lost court cases.³²

Other cities, it appears, are equally bedeviled by how to meet their legal and educational obligations to children with disabilities. The *New York Times* recently ran a series on these cities' experiences with the results of lawsuits similar to *Mills* that mandated education for all disabled children. Although New York's education system was trying desperately to lower special education costs and include more disabled children in regular classrooms, teachers in mainstreamed classrooms were complaining of having to distribute Ritalin (a tranquilizer), change catheters, and, where deaf students were not provided an interpreter, learn sign language.³³ Opinions were sharply at variance on whether inclusion works in all or even in most cases. An interpreter for a deaf girl "included" in a regular

29. Hamil R. Harris, *Learning-Disabled Students Face Change; School Closing Thrusts Some Into Mainstream*, WASH. POST, Sept. 16, 1993, at J1, J7.

30. Leonard Hughes, *Embroided in Special Education; School Officials Battle Tuition Increases, Backlog*, WASH. POST, Sept. 16, 1993, at J1 (only 487 D.C. special education students are in private schools at public expense, compared to 6600 in public special education programs).

31. Hughes, *supra* note 30, at J1.

32. *Id.* at J1, J7.

33. Gary Truman, *Special Pupils, Regular Classes, Thorny Issues*, N.Y. TIMES, Jan. 26, 1994, at A19.

public school class wrote a moving account of the girl's half-life in that classroom.³⁴

Alongside that story, however, was a more upbeat account of another mainstreamed pupil, an autistic first grader who could not speak when he came to school, who stayed alone much of the time and threw tantrums for no reason. Ian spent half a day in regular school and half in a special class. Within months, with the support of his regular classmates and the teaching assistant, he was speaking. The *New York Times* reported on his progress.

It seemed clear to the staff at Gateway that if Ian could prove so capable of inclusion, then virtually any other student could as well. And it didn't seem to benefit only Ian; sometimes inclusion's greatest value seemed to be what it offered the regular kids who had contact with him.³⁵

Albert Shanker, President of the American Federation of Teachers, is skeptical of the "problematic placements" that full-scale inclusion entails. "It makes no more sense to insist on including all kids with disabilities in regular classrooms, regardless of their condition, than it made to exclude them all."³⁶ The Learning Disabilities Association, a parents' organization, opposes mandatory inclusion as well, but the U.S. Department of Education, which administers special education grants of \$18 billion a year, has, in the past, ap-

34. The author discussed an alternative to inclusion:

This girl could go to a federally-financed school for the deaf, where all students can converse with each other, all the information is presented visually, teachers sign and deaf adults serve as role models, deaf kids lead the student government and star in the school play.

These schools prepare students for jobs and college. They also give the students access to the deaf community, which has its own language, folklore, traditions, social clubs, periodicals, athletic teams and political events. The schools have always served as the cultural center of the deaf community. Yet proponents of inclusion would like to close them, claiming that it would liberate deaf people from the "discrimination" of separate schooling and give them equality. All it would require are some sign-language interpreters to smooth out the differences, they say.

To many deaf people, this is at best maddeningly naive; at worst, it is chauvinistic. The history of deaf people is one of mandated assimilation: we can make you more like hearing people, we can make you more normal. . . . Is it the policy that will best serve deaf people? Or is it simply a way to further that great American myth, the one we seem to need like oxygen, that says we're all created equal?

Leah Hager Cohen, *Schools for All, or Separate But Equal? An Interpreter Isn't Enough*, N.Y. TIMES, Feb. 22, 1994, at A21.

35. Russell Martin, *Stepping Into the World*, N.Y. TIMES, Feb. 22, 1994, at A21.

36. Albert Shanker, *Problematic Placements*, N.Y. TIMES, Mar. 27, 1994, at E7 (advertisement); see also Carol Innerst, *Teachers Rally on 'Special Needs'; Union Opposes 'Full Inclusion'*, WASH. TIMES, July 18, 1994, at A3 (American Federation of Teachers steps up war against "full inclusion" by releasing poll that shows 77% of teachers in schools with such policies or moving toward that goal oppose idea).

peared to be a strong advocate of inclusion,³⁷ although a recent Congressionally mandated five-year study of what happens to "special needs students" in regular classrooms casts doubt on any total inclusion policy.³⁸

New York City's push toward inclusion is understandable. According to the *New York Times*, New York City's special education system has, since the court decree came down over two decades ago, become a "Cadillac in a school system of broken-down Fords."³⁹ More than twenty-two cents of every New York City education dollar or \$1.7 billion annually is spent on special education; the special education staff comprises almost 25% of all school system employees, serving 130,000 pupils or 13% of the City's one million school children.⁴⁰ Critics say the system "mislabels thousands of children, segregating many in dead-end classes from which few are ever released."⁴¹ In fact, 70% of students referred to special education are "learning disabled" or "emotionally handicapped," not deaf, blind, physically handicapped, or retarded.⁴² The vast majority (84%) of the learning disabled or emotionally handicapped students are black or Hispanic, and there is evidence that they are hurt, not helped, by consignment to the special education programs where they "languish" without stimulation.⁴³

In March of 1994, New York City's new School Chancellor Cortines announced his intention to downsize and decentralize the education specialists by putting them under the direction of local principals. Yet, within a year, reacting to pressures from parents, school employees, unions and politicians, Mr. Cortines announced he would postpone any shake-ups for at least another year.⁴⁴ A frustrated Mayor Giuliani, still seeking budget cuts, has deployed a special advisor to look into the problem. That advisor now says the City is doing more for disabled children than the law requires,

37. *MacNeil/Lehrer News Hour* (Public Broadcasting System, June 2, 1994).

38. See 'Special Needs' and Classrooms, WASH. POST, Oct. 10, 1994, at A22 (special needs students who spend all their time in regular classrooms fail more frequently than those who spend only part time there).

39. Sam Dillon, *Special Education Absorbs School Resources*, N.Y. TIMES, Apr. 7, 1994, at A1.

40. Sam Dillon, *Cortines Delays Changing Special Education System*, N.Y. TIMES, May 8, 1994, at 31.

41. Dillon, *supra* note 39, at A1.

42. *Id.*

43. A recent City Comptroller Report said that although nearly one quarter of the educational budget is spent on special education, the school system has "no way of measuring whether disabled students are getting an education or are developing skills. . . ." Sam Dillon, *Comptroller Report Faults Special Education Policy*, N.Y. TIMES, June 27, 1994, at B3 (cost less than \$6500 to educate a student in regular classroom contrasted with \$18,705 for special education). See also Lynda Richardson, *Minority Students Languish in Special Education System*, N.Y. TIMES, Apr. 6, 1994, at A1.

44. Dillon, *supra* note 40, at 31.

spending up to \$18,000 for such pupils as compared to \$3000-\$5000 for regular pupils. The Board of Education's budget director laments: "Kids that don't have court orders in their hands are dead meat."⁴⁵

That is the legacy of one public interest lawsuit. Handicapped children are in school, an increasing number in regular classes. Regular classrooms are good for some handicapped children, probably not for all. On net, however, more of these children are better off than in 1970; there is more money in the system for their education, though clearly not enough. Lawsuits like *Mills* helped put the money there. The downside of mainstreaming is the oversized burden on teachers to act as nurses, social workers, and therapists and the time that these extra responsibilities take from their education activities for normal pupils. Was it a lawsuit that should have been brought? The benefit to society of giving handicapped children a chance to achieve up to their capacity is unknown; the burden on regular pupils is unknown as well. Nonetheless, few would go back to 1970 when our lead plaintiff, a severely retarded boy of thirteen, had never been inside a classroom, spending endless days in a ghetto back bedroom tied to his bed by a distraught mother who had posted a sign on the door: "Beware of Idiot Child."

C. Deinstitutionalization

The second case I worked on, many years ago, allows for an even less definitive assessment of the values of public interest litigation. *Dixon v. Weinberger*⁴⁶ was the deinstitutionalization case, also brought in the 1970s, that sought to accelerate the release from long-term institutions of mentally ill persons who could make it on the outside with adequate support. The cruelty of being kept for an entire lifetime in barren, sometimes brutal settings without any treatment or rehabilitation seemed clear from the start; what became clear only later, however, was that society was not yet willing to provide the resources to allow those inmates to survive outside the institution—job training, residential facilities, out-patient care, crisis intervention services. Without such resources, is life on the streets better or worse than inside the institutions? An estimated one-quarter to one-third of homeless persons suffer from mental or emotional illness.⁴⁷

45. Sam Dillon, *Badillo Contends that the Cost of Special Education is Inflated*, N.Y. TIMES, Aug. 14, 1994, (Metro) at 1, 40.

46. 405 F. Supp. 974 (D.D.C. 1975).

47. Christopher Jencks, *The Homeless*, N.Y. REVIEW, Apr. 21, 1994, at 22-23 (surveys show one-fourth of homeless admit to having been in mental hospital; clinicians conclude one-third have "severe" mental disorders; one-third of Chicago sample of homeless reported "voices" and delusions).

The Mental Health Law Project, now the David L. Bazelon Center for Mental Health Law, where I worked in the 1970s, was a pioneer in the movement to formulate the civil rights and liberties of mentally ill and retarded persons. One of the first cases we took—all the way up to the Supreme Court—was that of Kenneth Donaldson, a Florida mental asylum inmate who had been locked up without treatment for fifteen years because of chronic mental disorders though he was not considered dangerous to himself or others. Our lawyers argued that such a person may not be institutionalized against his will without treatment, and the Supreme Court eventually agreed he must be released.⁴⁸ In the twenty years since, he has, incidentally, become a self-sufficient member of society as well as a reformer of the mental health system. Testifying before Congress a few years after his release, Donaldson spoke of his fifteen-year ordeal in an underfunded, understaffed Florida state institution:

The saddest thing is seeing people die in front of your eyes—not only old men, . . . old men of course go quicker than the younger ones. They would give up hope after about two years. People deteriorate physically when they are in confinement—even the young people. But many of the older people just gave up.⁴⁹

For ten years, Donaldson's only doctor had been an obstetrician who cared for 1300 other patients, appearing once every few months to ask the same rote questions: "What ward are you on? Are you working? Are you taking medication?" During his time, Donaldson witnessed sadistic attendants, physical abuse, and free intermingling of insane criminals and docile, senile old men. Donaldson was convinced he survived only because he refused to take medication.⁵⁰

The deinstitutionalization suits, however, were not confined to the Donaldsons, who likely could survive on the outside without special services. Our plea was for those who did not need to be institutionalized if they had the support of outside services, and our requested relief was that the community simultaneously reduce institutional populations and establish alternative services. In Washington we sued both the federal and D.C. governments (each having overlapping responsibilities for St. Elizabeth's, the leading mental institution), asking for patient evaluation, discharge of those who could be maintained on the outside, prompt establishment of needed community services, and judicial monitoring of a plan to accomplish the transfer. Ambitious? A bit, I would say in retrospect. Our legal theory was that patients whose liberty is taken from them through

48. *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

49. *Mental Health and the Elderly: Joint Hearings Before the Subcomm. on Long-Term Care and the Subcomm. on Health of the Elderly of the Sen. Special Comm. on Aging*, 94th Cong., 1st Sess. 7-8 (1975) [hereinafter *Senate Hearings*].

50. *Id.* at 9-10 (testimony of Kenneth Donaldson).

civil commitment have a right to the least restrictive kind of control, in this case outside living with the requirement they accept monitoring, psychiatric services, specialized living conditions, whatever it took to keep them from posing a danger to themselves. The hospital staff itself calculated that 43% of the inmates, roughly one thousand patients, did not need total institutionalized care. Again, as in *Mills*, we had a statutory ground for our suit; the 1964 Hospitalization for the Mentally Ill Act required the District of Columbia to place patients in the least restrictive alternative settings necessary for their care and protection.⁵¹

Our lead plaintiff, Herbert Dixon, was a very different type of patient from Kenneth Donaldson. He was confined to a wheelchair, sixty-five years old, institutionalized for twenty-three years, often confused and disoriented. Our mental health experts told us Dixon and others like him needed small community-based homes with adequately trained operators and visiting therapists; we estimated 350 such personal care homes serving six patients apiece would be needed in the District to take care of those who met appropriate outplacement criteria. Medicare, Medicaid, and Supplemental Security Income entitlements could provide some of the funds for such community care but clearly not all.

The suit was filed in February 1974. In December 1975, District Judge Aubrey Robinson ruled that the D.C. and federal governments jointly must create community-based services for patients who could live outside of a total care situation. But it was not until April 1980, after five years of negotiation, that federal and D.C. officials finally agreed to a plan outlining standards for assessing patients eligible for outplacement and the community facilities into which they could appropriately be moved. The court approved the plan and set up the Dixon Implementation Monitoring Committee ("DIMC") as the enforcer. In October 1984, Congress set a schedule for transfer of the operation of St. Elizabeth's to the District and again mandated a comprehensive community-based mental health service system; in March 1987, the D.C. Commissioner of Mental Health agreed to a specific timetable for the creation of community residences and outreach services; in June 1989, the District signed on to a new two-year schedule to reduce hospital beds at St. Elizabeth's and develop alternate community living arrangements; in January 1992, the court ratified a new consent order between the lawyers of the Mental Health Law Project and the District for a five-year plan to accommodate 5000 patients, including 2500 homeless in 375 residences at a cost of \$8 million; in May 1993, the judge, frustrated by the failure to make any serious starts at implementation of

51. *Dixon v. Weinberger*, 405 F. Supp. at 979.

the five-year plan, appointed a master to oversee its development,⁵² lamenting: "[Twelve] years is long enough for the District to perfect and effectuate a system which protects the legal rights and lives of the mentally ill in the community consistent with its statutory mandate."⁵³

(A personal note that gives some perspective on the pace of these developments: Between 1975 and 1994, I was appointed to the Court of Appeals, after seven years became Chief Judge, served five years of my term, continued as an active judge in the four years since; Judge Robinson became Chief Judge of the District Court, served *his* term of ten years and took senior status. All this while we worked together; after twenty years the case drags on.)

Three months after the master was appointed, the D.C. Council repealed the thirty-year-old statutory provision guaranteeing treatment in the least restrictive setting on which the lawsuit had been based seventeen years earlier.⁵⁴ In April 1994 the master, whose one-year term was scheduled to end in July, again reported "botched contracts, untrained workers, budget problems and an overall lack of commitment" from the District.⁵⁵

St. Elizabeth's is a sad and unfinished story. Other cities, small and big, have variations on the same theme. In January 1994, the Public Broadcasting System ran a *Frontline* story called *A Place for Madness* detailing the results of a deinstitutionalization suit in Massachusetts.⁵⁶ In 1955, 2300 mentally ill people were living in wretched conditions in a state hospital in Northampton; a class action brought on a theory similar to ours obtained their release; now the institution has been closed down and only twenty-five remain in a total care setting. The town complains they are roaming the streets, although few disruptive incidents are reported. Most live on welfare in a place called Mrs. Shaw's Motel where an untrained but compassionate woman watches over them, calling the authorities

52. Amy Goldstein, *Court Takes Over D.C. Mental Health Services; Judge Gives Reins to Outside Specialist*, WASH. POST, May 18, 1993, at A1.

53. Claudia Schlosberg, *Misguided Management of the Mentally Ill*, WASH. POST, July 11, 1993, at C8; see also James Ragland & Amy Goldstein, *Order on Mentally Ill Seems Intrusive to Kelly*, WASH. POST, May 19, 1993, at C1.

54. Laurie Davis, *An Expensive Way to Hurt the Homeless*, WASH. POST, July 25, 1993, at C8.

55. Nancy Lewis, *Report Blasts D.C. Mental Health Care Record*, WASH. POST, Apr. 23, 1994, at B3. See also Letter from Peter Nickles to U.S. District Court Judge Aubrey E. Robinson, Jr. (Feb. 25, 1994) (on file with author). Ironically, the cost for a St. Elizabeth's inpatient has risen to \$300 per day, for an outpatient \$70. Bureaucratic delay or intransigence or both thus entail estimated annual costs of \$90,000 per patient for institutional services that could be had in the community for \$21,000. Davis, *supra* note 54.

56. *Frontline: A Place for Madness* (WETA television broadcast, Jan. 18, 1994), reviewed in Sandra G. Boodman, *Closing a State Mental Hospital*, WASH. POST, Jan. 18, 1994, (Health) at Z8.

when her roomers become uncontrollable. The legal services lawyer who brought that suit has no regrets. "The largest and most heinous crime [about the institution] was that we had made people invisible."⁵⁷ A commentator on the Northampton experience concludes, "The failures of deinstitutionalization are in large part a reflection of inadequate and inaccessible community services, not of the fact that former patients were too sick to live outside hospitals."⁵⁸

There are changes in the wind. This past year, Governor Cuomo came up with a plan for New York's mentally ill under which money saved in closing mental health institutions would be specifically allocated to community mental health services.⁵⁹ It doesn't happen automatically. In 1955 there were eighteen hospitals in New York for 93,000 patients; in 1993 there were twenty-two hospitals for 10,000 patients; after about forty years there were 82,500 fewer hospital beds but only 12,500 more community beds for the mentally ill.⁶⁰ Governor Cuomo has striven to close down institutions, not beds; he and the legislature eventually agreed on how to siphon \$180 million saved from closing five hospitals back into community services.⁶¹ He may have a tiger by the tail, but he is at least trying to contain it.

57. *Id.* Visibility alone may have a potential for effecting long-term changes in public attitudes toward the mentally ill and disabled. See, e.g., Maria Laurino, *Out of the Attic and Asylum and Into the Camera's Eye*, N.Y. TIMES, July 3, 1994, § 2, at 1, 18 (more frequent appearances of mentally ill and retarded persons as heroes on television and in movies attributed to "increased presence . . . in schools, offices and neighborhoods since deinstitutionalization; the once demonized 'other' has become the boy next door.").

58. Boodman, *supra* note 56.

59. Kevin Sack, *Why Politics, As Usual, Is Not Helping the Mentally Ill*, N.Y. TIMES, July 26, 1993, at E5 (the estimated number of mentally ill nationally will grow to nearly 33 million by the year 2010. Since 1955, the number of institutional patients has gone down from 559,000 to 100,000 and several of the less populous states have actually made community care work. Wisconsin, for example, allocates money per county which the county then decides how to spend; in Madison only 50 out of 1300 patients are in long-term total care. Ohio has reduced its inmate population from 3800 to 2000 since 1988). See generally NAT'L INST. OF JUSTICE, *MANAGING MENTALLY ILL OFFENDERS IN THE COMMUNITY* (1994) (reporting on Milwaukee's successful efforts at keeping mentally ill offenders stable and law-abiding through community support programs).

60. Michael Winerip, *A Home for Anthony*, N.Y. TIMES MAGAZINE, June 5, 1994, (Magazine) at 50, 52 (New York spends \$100,000 a year to care for a patient in hospital compared to \$35,000 in group home); H. Jack Geiger, *A House This Side of Madness*, N.Y. TIMES, July 10, 1994 (REVIEW OF BOOKS) (reviewing MICHAEL WINERIP, *9 HIGHLAND ROAD* (1994), recounting the history of a group home and its problems with "Not in My Backyard" syndrome).

61. Mary Brosnahan & David Giffen, *Out of Hospitals, Left on the Streets*, N.Y. TIMES, Aug. 7, 1993, at 21 (state spends 60% of mental health budget on 10% of mentally ill persons in hospitals; hospital population has declined to 10,500; for every hospital bed emptied, the state saves \$105,000 annually); *A Wise Plan for the Mentally Ill*, N.Y. TIMES, Nov. 19, 1993, at A32 (substantial portion of projected savings of \$210 million over five years from closing down five institutions will be channelled to community services). On the other hand the *New York Times* reports "momen-

There have been some spectacular success stories with other deinstitutionalized populations. In 1973 our same Mental Health Law Project successfully sued New York State to deinstitutionalize the notorious Willowbrook, the principal state facility for the mentally retarded, housing 23,300 retarded persons in sordid and despicable conditions.⁶² By dint of a pugnacious judge who not only ruled for the plaintiffs but stayed with the case for twenty-five years and a resilient network of parents who lobbied incessantly for better community facilities and monitored them carefully, today only 4300 of the former inmates remain institutionalized and 11,500 are in generally adequate and satisfactory group homes. Nine institutions have been shut down; all are expected to be gone by the year 2000.⁶³

Dixon and its cohort litigation teach us lessons. Identifying a legal right to redress an inequity in the treatment of a group long suppressed does not in our complex society carry with it any assurance society will do better. It may be a necessary first step, but it is one with unintended and unforeseen consequences.⁶⁴ Institutional interests, be they asylum staff or government bureaucrats, are change-averse and cringe at risk; without persistent pressure from concerned relatives, lobbyists, and community leaders, a system will

tum is building in support of proposals that would give health workers and mental health officials more authority to force people into treatment against their will," i.e., to make involuntary commitment easier for mentally ill homeless people. Lisa W. Foderaro, *New York Debates Its Rules for Committing Mentally Ill*, N.Y. TIMES, June 17, 1994, at A1. One bill would place those released from mental hospitals under court order to take medication and get counseling at risk of being returned to the hospitals as a form of "outpatient commitment" if they refused. *Id.* See also Ian Fisher, *Bill Compels Care for Mentally Ill*, N.Y. TIMES, July 1, 1994, at A1. Most recently New York has come up with a plan to create a "managed-care network" for 35,000 of the State's mentally ill in the community, using Medicaid funds. Each patient would be provided a single care provider who would act as a gatekeeper to access to other special housing and outpatient services, and that gatekeeper would be held accountable for serving the patient. Savings on hospital beds would be channelled into mobile treatment teams and home visits. Lisa W. Foderaro, *Albany Seeks Managed Care for Mentally Ill on Medicaid*, N.Y. TIMES, Nov. 13, 1994, (Metro) 45.

62. New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975); see also New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

63. Michael Winerip, *Turning Words of Compassion Into Solutions*, N.Y. TIMES, July 11, 1993, at 27. But even in the community, tragic things still happen. See Selwyn Raab, *Abuse Found in Center for Retarded*, N.Y. TIMES, July 7, 1994, at B4 (\$2 million spent between 1988 and 1992 for mentally retarded in community home bought "ragged clothes, vermin-infested beds, a regular diet of pork and beans and a tongue-lashing if residents spoke during meals").

64. See, e.g., Jencks, *supra* note 46, at 24 (Medicaid payments provided financial incentives for short-term psychiatric care in general hospitals and long-term care nursing homes; Supplemental Security Income's availability only to discharged patients was incentive for their release, but since low benefits meant they could afford only meager shelters not meeting their needs, many drifted onto streets).

not turn around because a legal decree says it should.⁶⁵ There will always be other voices competing for the resources needed to transform the system, even when change will save money in the long run. Sometimes a dogged judge can make the difference by insisting that something be done, but in the climate of the '80s—perhaps the '90s as well—that kind of intervention is too often condemned as judicial activism.

David Rothman, the social historian, has aptly said that the reforms of one generation become the scandals of the next.⁶⁶ It is something for public interest lawyers to think about as they contemplate redistributive lawsuits. Yet, on balance, I would not apply Rothman's aphorism to either *Mills* or *Dixon*. My experience does, however, suggest caution in one's aspirations, care in an attempt to predict at least the immediate consequences of a legal victory, and commitment to seeing the aftermath of such a lawsuit through to some tangible gain. Too many lawsuits cannibalize dozens of short-term lawyers until there are no survivors in the litigation who remember how it all started. The glory of a legal victory, even in the Supreme Court, fades fast. Some successes can be claimed on the basis of a court's legal ruling alone, but where a public interest lawyer enters the arena of public policy and resource allocation, she needs the energy and perseverance of a long-distance runner, not a sprinter, and the humility to be satisfied with incremental gains. The balance in determining when to bring a lawsuit with major implications for allocation of public monies is a delicate one. If a vulnerable population is suffering a loss in fact as well as in law, that alone may be enough, regardless of the dislocations that will follow. But should the lawyer make a reasonable if rough judgment that the same population will not be worse off as an immediate result of a legal victory, must she not be willing to pursue the proper remedy in many fora for months and years to make it a net gain for her hapless clients? If she hits and runs, as many part-timers in the public interest area undoubtedly do, can she rest easily with the simple notch in her legal belt? I leave it to you to ponder this enigma as you make your career and litigation choices.

II. THE GOVERNMENT LAWYER

Most lawyers who do not represent private clients work for the government—federal, state, or local. The government is, after all,

65. Community groups can make a difference. See Diana Shaman, *About Real Estate; Mentally Ill Residents Share a Project*, N.Y. TIMES, Apr. 8, 1994, at B7 (22 mentally ill persons share public-supported residences with 29 formerly homeless single parent families).

66. JOHN Q. LAFOND & MARY L. DURHAM, *BACK TO THE ASYLUM* 100 (1992) (quoting DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1971)).

supposed to be the ultimate embodiment of the public interest. A government lawyer works on behalf of the public, as an elected or appointed official, in which role he gets to define officially what the public interest is.⁶⁷ Every time an administration changes, there is keen competition among lawyers for top government policy spots.

I have worked as a lawyer for the government in several capacities, principally as a staff lawyer in the Justice Department in the mid-sixties, and as an Assistant Attorney General in the late seventies. I learned in those stints the constraints of government lawyering as well as its rewards. There are two decisions a government lawyer confronts during her career in the public service: What is the most enlightened decision for the public interest? And what if I disagree with the decision my superior has made about the public interest?

At first glance the first decision sounds energizing, but the criteria by which a public servant judges what is in the interest of the people is not so clear. She may look for the public interest as objectively defined by the popular vote, illustrated by opinion polls, or in the persona of an elected (and hence politically accountable) official who is her boss. What the lawyer herself subjectively thinks about the public interest does not usually matter much, at least until she reaches the pinnacle of power. There are also long-term and short-term public interests in government lawyering. A particular position may seem to bring about the most appealing result in the instant case but in the long run present real risks as applied to likely future policies. The government is a repeat litigator in court; it cannot, or at least should not, present one position today and another tomorrow. The government, in concept, represents all the people. If the interests of one group are pitted against another, on what basis does the government lawyer decide which interest should prevail? The one with the most constituents, the one whose benefits exceed the costs to others, or the one which occupies the higher moral ground? There are also institutional policies and precedents to take into account. No administration starts life anew; cost/benefit analyses may militate toward letting some needs go in favor of others that will produce greater payoff for the resources expended. And politics are ever-present in government policymaking. What will the political spillover be in adopting one policy over another? Is it fair to consider whether the "right" decision could result in weak-

67. See Barbara Allen Babcock, *Defending the Government: Justice and the Civil Division*, 23 J. MARSHALL L. REV. 181 (1990) (government lawyer represents client agency, government as a whole, and public interest; this tripartite role occasions conflict).

ening an administration to the extent it might be replaced by another that would make far fewer decisions in the public interest?⁶⁸

That is old stuff to political science buffs, but it is still surprising how many political appointees enter government service brightly self-confident only to find early on that their options are severely constrained by departmental or agency tradition or precedent, by political considerations, even by the need to keep the loyalty of permanent civil servant "troops" who can make or break a political appointee. Quite a few conclude that it is easier to stick with the status quo than take the heat that envelops changemakers. Experience shows that if appointees do initiate reforms of any consequence, they could be gone before their time as their enemy quota expands until it is large and powerful enough to "get them." There have been seven Deputy Attorneys General in the last ten years; the Federal Housing Administration has had thirteen commissioners in the past fourteen years, and three different Assistant Secretaries for Post-Secondary Education served in one eighteen-month period in 1991-92.⁶⁹

On the issue of deciding what is in the public interest, I cite a dilemma faced very early in my job as a Department of Justice Congressional Liaison. During his presidential campaign, which came on the heels of Watergate and the firing in the Saturday Night Massacre of Archibald Cox, the Special Prosecutor, President Carter had proclaimed support for an Independent Counsel law, even though the Criminal Division of the Justice Department had been traditionally opposed to it and even though some Carter appointees in the Department privately said it was institutionally a dangerous idea. The Attorney General, of course, was committed to the President's call on the issue, whatever his personal opinions. The Senate Judiciary Committee—not only its members but its senior staff—was also divided on the issue, and the bill was destined to rise or fall there. Early in the hearings, one of the old-time staffers took me aside in the corridor and said plainly, "We know you have to follow the White House position in public; we also know the Department of Justice is conflicted on this; but if you give the word, we'll kill the Independent Counsel bill in committee." A nod would have pleased the older institutional interests at the Department, probably not brought tears to the eyes of some Carter appointees there, and my role would have been indiscernible at the White House. Even then, a novice of government, I was not so naive as to misunderstand

68. *Id.* at 192 (detailing "how hard it is [for a government lawyer] to define the public interest except in terms of the current administration's policies").

69. Stephen Barr, *When the Job Gets Old After Only Two Years*, WASH. POST, June 2, 1994, at A21 (reporting on General Accounting Office study on length of stay of 567 top-ranking presidential appointees); see also *The Permanent Non-Government*, WASH. POST, June 3, 1994, at A22 ("relationship between civil servants and political appointees . . . needs fixing").

that. Out of a combination of personal beliefs and ethical constraint, I declined the offer, the bill became law, and I believe the history of the 1980s proved that to be the right choice. But a choice it was. Earlier that year a Department of Justice veteran "accidentally" left on the hearing room bench a very critical intra-departmental analysis of a motor-voter bill supported by the White House, and the bill died in committee. There are opportunities aplenty for government lawyers to undermine their superiors' views of the public interest in favor of their own, a temptation that is not always resisted.

And there comes a time in the career of some government lawyers when they confront the ultimate choice: a conscience that does not permit them to "go along" with a proposed position of the Administration or Department. The conflict must be a very serious one to give rise to such resistance or the individual should not be in government to begin with. The most famous resignations in recent times occurred during the Saturday Night Massacre in October 1974, when President Nixon ordered the firing of Archibald Cox in order to stop his judicial challenge to the President's claim of privilege on the Watergate White House tapes. Attorney General Elliot Richardson resigned rather than carry out Cox's dismissal, and Deputy Attorney General William French Smith followed suit.⁷⁰ According to one account, at the time of resignation, President Nixon urged Richardson to delay his departure because of a Middle East crisis and accused him of putting his "personal commitments ahead of the public interest."⁷¹ Solicitor General Robert Bork then became Acting Attorney General and implemented the President's order, a course that haunted him during his unsuccessful bid for the Supreme Court in 1987. History has treated the resigners well, bestowing upon them the label of men of principle.

But it does not always turn out that way. Last year several mid-level officials in the State Department quit their jobs to protest U.S. policy in Bosnia, asking that we intensify diplomatic efforts, end the arms embargo against the Bosnian Muslims, and bomb the Serbian artillery shelling Sarajevo. They all had promising futures. One compiled daily reports on the Serbian atrocities in Bosnia and said, "You close your eyes and get holograms of the carnage in your mind." According to the *Washington Post*, he handed in his resignation, writing, "I am personally and professionally heartsick by the unwillingness of the United States to make resolution of the conflict in the former Yugoslavia a top foreign policy priority." Another said, "What we were doing was not only wrong . . . it was something I couldn't participate in. . . . We would write stuff we knew bears no

70. Lawrence Stern, *Cox Affair: Far From the End of Nixon's Troubles*, WASH. POST, Oct. 28, 1974, at A1, A6.

71. STANLEY I. KUTLER, *THE WARS OF WATERGATE* 405-06 (1978).

relation to what was happening. . . . And ultimately you wanted to cry." Secretary of State Warren Christopher denounced his resignation as the act of a "young officer." Hundreds of congratulatory calls and notes followed the men's resignations, and one eventually found a job with a congressional critic of the Bosnian policy. The others left government, at considerable sacrifice to their careers and to their pocketbooks.⁷²

Resignations on principle usually produce a week-long flurry of television interviews and then deadening silence and the need to find another job with the threatening line on the resume—Resigned in Protest. In the case of Bosnia, the Administration policy a year later tracked at least some of what these young men were asking. Was their early retirement worth it? Could they have been as effective if they waited to press their course of action later?

By its very nature, government service is likely to involve more policy tradeoffs and judgment calls than private advocacy. Career civil servants can advise but often do not decide and yet it is they who must carry out policies whether they like them or not. Political appointees must be realistic about the compromises necessary to run government, yet they too can be seduced by the siren call of "team spirit." Whatever it takes to keep the Administration in power is by definition worthy. Critical choices come with the turf. A government lawyer should always have some line he will not cross, some pang of conscience he will not suppress, if he is truly to serve the public interest.

III. THE JUDGE

There is a third class of public interest lawyer—the judge. She is a public servant to be sure, sworn to devote her efforts to uphold the laws and Constitution, eschewing all private interests. Yet she is altogether different from a government lawyer who serves a political, elected Administration and advocates the best interests of that Administration inside and outside. A judge must be as wary of the political branches as of private parties; her job often involves settling disputes between the two. Indeed, Thomas Jefferson and James Madison believed that a judge's primary *raison d'être* was to protect citizen rights from majoritarian tyranny, even popularly elected tyrants.⁷³ Only a fortunate few get the opportunity to judge,

72. Laura Blumenfeld, *A Sense of Resignation: The Bosnia Dissenters*, WASH. POST, Aug. 28, 1993, at F1, F6. See also John M. Gesko, *In the Foreign Service, Complaints Grow About Clinton's Team*, WASH. POST, June 20, 1994, at A13 (since the 1991 breakup of Yugoslavia, five State Department employees have resigned in publicized protests against U.S. policy, one a 30-year veteran of the Foreign Service and former ambassador to Yugoslavia).

73. "[I]ndependent tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the

and I am grateful to be one of them—despite the relative anonymity and inevitable constraints it places on speaking out, staying politically active, and gossiping at cocktail parties. But how exactly does a judge advance the public interest? What dilemmas are lurking in this most enviable of public interest jobs? Why do a fair number of able, public-spirited citizens turn it down or eventually leave it for other jobs?⁷⁴ What are the rules of the judging game?

Tomes have been written on the appropriate role of a judge in a democratic society. In recent years, I think unfortunately, they have tended to focus almost exclusively on admonitions that judges should not invade the policymaking functions of the political branches—the Executive and the Legislature. Judges in that taxonomy are activist or restrained (the first is bad, the second good), according to whether they give a lot or too little deference to the interpretations of statutes and the Constitution made by Executive agencies.⁷⁵

Most commentators on the judicial role debunk the “strawman” of legal formalism—the judge who mechanically applies a set of rules called “the law” to each situation, as well as more extreme forms of “legal realism” in which all sorts of factors personal to the judge, including what he ate for breakfast, combine to produce one decision rather than another, sometimes called the “chaos theory” of decisionmaking. Reasonable commentators recognize the need for judges to follow ascertainable rules and to be insulated from economic or personal ties that might motivate them not to follow those rules. But they also recognize that where fixed rules do not resolve the matter, the judge should and does make decisions that try to maximize social welfare. In Boston University Dean Ronald Cass’s words:

The judge in my model is constrained from most outcomes by governing authority [and] takes those authorities seriously

. . . .

Constitution by the declaration of rights.” 1 ANNALS OF CONG. 437-39 (Joseph Gales ed., 1834) (quoting James Madison introducing the Bill of Rights in 1789 on the floor of the House of Representatives). See also letter from Thomas Jefferson to James Madison (March 15, 1789), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 620 (1971) (advocating virtue of Bill of Rights for “the legal check which it puts into the hands of the judiciary”).

74. See generally EMILY FIELD VAN TASSEL ET AL., FEDERAL JUDICIAL HISTORY OFFICE, FEDERAL JUDICIAL CENTER, WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 TO 1992 (1993) (7% or 189 federal judges resigned for reasons other than health or age in 203 years).

75. See, e.g., Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 11-12 (1983). Compare, however, RICHARD A. POSNER, LAW & ECONOMICS WORKING PAPER NO. 93-003, WHAT DO JUDGES AND JUSTICES MAXIMIZE? (THE SAME EVERYBODY ELSE DOES) (1993) (economic model of judges analogizes incentives to those of voters, nonprofit enterprises, and theatre-goers).

. . . [But] the judge's own internal compass—his sense of justice, of good results, of proper professional conduct—can exert a powerful influence on decisions. . . . Many controversial decisions . . . about desegregation, about rights of criminal defendants, about speech rights seem . . . difficult to explain apart from this factor.⁷⁶

I think in the main Dean Cass is right on, but let me take his formula through the paces in a few areas of judging I deal with, to show how one judge defines the public interest.

A. *Agency Cases: Results and Rationales*

Cass's model judge defines the public interest in terms of following precedent, maximizing the law's predictability, and even in many cases subordinating one's own judgments to other judges' for unanimity's sake. In a majority of cases that formula probably works. In our circuit, for instance, up to 50% of our docket consists of appeals from regulatory agencies, where, candidly, the judges' greatest challenge lies in understanding the nature of the dispute between the parties, deeply embedded as it usually is in arcane scientific and technical terms and equations. Generally, we only decide agency appeals against the government if we can't understand the agency's reasoning or think it missed some vital inquiry or, occasionally, if the agency has definitely (not just maybe) misinterpreted the statute. Of course there is always a judgment factor in deciding how muddy the agency's reasoning has to be before we refuse to defer to it—especially if the result looks defensible. But rarely in the garden variety administrative law cases do we come even close to factoring our own public policy preferences or doubts into our decision. *Sierra Club v. Costle*,⁷⁷ the longest decision I ever wrote (and which may go down in judicial archives largely for that distinction) represented months spent in mastering the data on which Clean Air Act⁷⁸ new source performance standards for fossil fuel utility plants were based; yet the end result was to affirm the agency, and although the case had enormous consequences for the utility and coal industries, it had little precedential value because of its fact-based nature.⁷⁹ Now many commentators said we let the agency get off too easily, that the real reason behind the EPA's final rule was an abject submission to pressure exerted from Congress to save the West Virginia coal industry. As a judge, however, I was not supposed to take ac-

76. Ronald A. Cass, *Judging* 29, 36 (1993) (unpublished manuscript, on file with author).

77. 657 F.2d 298 (D.C. Cir. 1981).

78. 42 U.S.C. §§ 7401-7671 (1988).

79. *Costle* stretches for 133 pages in the Federal Reporter. At the end of the opinion, I summed up the simple rationale of our decision with a touch of irony. "In this case, we have taken a long while to come to a short conclusion: the rule is reasonable." *Id.*

count of such factors, though I certainly knew about them by dint of the involved parties and commentators mailing us gratis copies of everything they wrote on the subject. The courts' job under the Administrative Procedure Act⁸⁰ was simply to insure that the administrative process was not capricious or unfair, and the agency had made a defensible choice.

There are many, many cases where I do not like the results I approve, and if I were a legislator or even an administrator I would rule the other way. Yet principle, precedent, and, yes, practicality (my colleagues or those higher up would promptly reverse if I deviated far from norms) stay my hand.

B. Where Precedent Leaves Off, Where Does Judicial Activism or Restraint Lie?

Two aspects of administrative law that have produced great controversy are the threshold doctrines of standing and ripeness, the gatekeepers of accessibility to the courts. The application of these entirely judicially-made doctrines determines whether courts ever get to the merits of a controversy at all. Every year we dismiss about 15% of our appeals for failure to make it over these hurdles. The post-Warren Supreme Court, beginning back in the 1970s, laid down a triple-pronged test for deciding who could bring an action, including an appeal, in federal court. The plaintiff must show (1) that he has suffered actual or imminent injury, (2) that the injury was caused by the defendant's action, and (3) that the court can set it right.⁸¹ Sounds simple, but in complex government regulatory programs, particularly those that use governmental grants or other economic incentives to motivate private third parties to act in a certain way, a showing that the third party is directly responsible for the plaintiff's injury is not so easy for plaintiffs to make. I personally believe that the standing necessary to challenge a government program should be satisfied if the governmental action was a major contributory factor to the private party's action that caused the plaintiff harm. The majority of my court, however, does not agree and has imposed ever stricter requirements for showing direct causation, even when there are already legislative findings of a cause-and-effect relationship between the governmental programs and the plaintiff's grievances.⁸² Many of us see an important public interest served in getting to the merits of real and serious controversies in-

80. 5 U.S.C. §§ 500-576 (1988).

81. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976).

82. *See, e.g., Center for Auto Safety v. Thomas*, 847 F.2d 843 (D.C. Cir. 1988) (en banc) (court evenly divided on issue of standing of auto safety membership organization to challenge CAFE standards rule that compensates auto manufacturers retroactively for changes in testing procedures used to measure fuel economy of their fleet).

volving major governmental programs and find it more judicial activism than judicial restraint to second-guess the legislature when it specifically makes findings on the nexus required for standing. Surely in most cases the Congress has closer ties with the real world and better means of getting accurate information about how things work out there than we judges do.

C. *Constitutional Conundrums*

When a judge is faced with construing the Constitution, as opposed to a statute, the prism through which she views the public interest changes perceptibly. Our Founding Fathers conceived of the federal judiciary as the major bulwark for the individual against the will of the majority. A constitutional scholar has aptly observed that, "In almost every case in which they have declared a constitutional right, the courts have acted contrary to the discernible wishes of a majority of the people."⁸³ Thus judges can hardly defer to the political branches as to what is in the public interest in constitutional cases; the public interest must be viewed as the longer-term interest of the nation in honoring its constitutional pact. Where constitutional text itself (or prior Supreme Court construction of that text) is not determinative, searches for resolutions that enhance the basic values enshrined in the Constitution must be launched. I don't need to tell you that judges can and do differ on what the values embodied in the Constitution are and how they balance out against each other.

The most vexing constitutional issues in my time on our court have arisen in the areas of race, gender, and sexual orientation discrimination. The problem of what, if any, and when racial or gender factors should be favored in government benefits programs has proven a continued source of controversy in our courts. In 1985 the case of *Steele v. FCC*⁸⁴ dealt with the then Federal Communications Commission ("FCC") policy of awarding an extra credit to women managers-owners in comparative broadcast licensing hearings. The justification for this preference was that the woman's close involvement in station operations would likely produce more diverse programming, something the FCC could not directly decree. A similar extra credit for racial minorities had been in place for many years and approved previously by our court. The majority of the *Steele* panel, however, decided that the racial minority credit should not be extended to gender, because that would not be in the "public interest." In effect, the court was saying it knew better than the FCC what the public interest required. I dissented on the basis that a history of exclusion of women as well as the present paucity of women in broadcasting justified the FCC's policy of encouraging diver-

83. Jack Greenberg, *quoted in ARON, supra* note 4, at 108.

84. 770 F.2d 1192 (D.C. Cir. 1985).

sity by awarding women an extra credit. Before the case could be heard *en banc*, the FCC petitioned for a remand in order to conduct an inquiry into the constitutionality of any credit based on gender. Congress then intervened and forbade the FCC to hold any such inquiry; the FCC obliged and a new appeal was taken from another decision, *Lamprecht v. FCC*,⁸⁵ allowing the credit. In the meantime, a new variation on the racial preference in FCC licenses had also come up on appeal involving a challenge to the constitutionality of a different FCC program that gave minority owners a preference in buying out licenses of existing station owners who were confronting trouble in relicensing. A second panel, on which I also ended up dissenting, ruled the preference unconstitutional as unjustified by any particularized evidence of past discrimination against minorities in broadcasting.⁸⁶ This decision went on up to the Supreme Court where Justice Brennan, in the last opinion he ever filed, called *Metro Broadcasting v. FCC*, reversed our court and held that deference to Congress required that the preference be found constitutional.⁸⁷

We now returned to the women's preference issue again, as it reappeared on appeal in the *Lamprecht*⁸⁸ case. This time a panel different from the panel that decided *Metro Broadcasting* found Congress had no empirical basis on which to legislate the credit for women as a means to diversity programming. This decision, written by Judge Thomas, seemed at the time extremely vulnerable in that it laid down a constitutional standard of evidence for legislative findings at odds with the deference the Supreme Court has traditionally given in other cases. Judge Thomas distinguished the *Metro Broadcasting* racial preference decision on grounds I found unpersuasive. I still see no way to reconcile the two cases in any principled way; the women's preference case was not appealed to the High Court, but it is difficult to see how any view of the public interest is served by the present paradox.

In the volatile area of gay and lesbian rights, our court has been similarly conflicted. Just this past year, in *Steffan v. Aspin*,⁸⁹ we dealt with a case that arose under a prior incarnation of the "don't ask, don't tell" policy for homosexuals in the military. *Steffan* involved the Annapolis midshipman who admitted he was gay and was forthwith discharged from the Academy and the Navy although no evidence of active homosexual conduct was ever introduced. The original panel, of which I was a member, decided that a discharge based solely on an admission of homosexual orientation, without ev-

85. 958 F.2d 382 (D.C. Cir. 1992).

86. *Shurberg Broadcasting v. FCC*, 876 F.2d 902 (D.C. Cir. 1989).

87. *Metro Broadcasting Co. v. FCC*, 497 U.S. 547 (1990).

88. *Lamprecht v. FCC*, 958 F.2d at 382.

89. 8 F.3d 57 (D.C. Cir. 1993), *vacated*, No. 91-5409, 1994 U.S. App. LEXIS 9977 (D.C. Cir. Jan. 7, 1994) (*per curiam*).

idence of homosexual conduct, was unconstitutional. We were promptly *en banc*ed by our brethren, even though the government did not itself ask for rehearing on the main issue. The outcome of that *en banc* decided that the Navy could infer from Steffan's admission of homosexuality that he was likely to engage in prohibited conduct.⁹⁰ I wrote a strong dissent for myself and two colleagues, finding no rational basis for such an inference, given our long constitutional tradition of refusing to sanction individuals on the basis of status alone.⁹¹ The question for me was quite simple: Could I conscientiously conclude that practicing gays can be excluded from the military because of the revulsion of others or because of a popular belief, unsupported by record evidence, that anyone who admits to being gay inevitably acts out his sexual preferences? The issue persists under the new "don't ask, don't tell" policy. Indeed, several federal district courts around the country have found both the old and new gays in the military policies unconstitutional, despite apparent overwhelming support among our political and military leaders of such a policy.⁹²

D. *The Public Interest in Dissenting*

A judge's job is to resolve cases and to declare what the law is. In appellate courts the judges may not always agree. In many countries there is only one opinion rendered by a court, whether all judges agree with it or not; the dissenters by rule are silent. The rationalization for this judicial mode is that it is unsettling to citizens and to the development of a stable body of law to have judges publicly disagreeing with each other. Our practice is different; from the beginning we have had a tradition of eloquent dissent, what Chief Justice Hughes called an "appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed. . . ."⁹³ A judge must still, however, think carefully about whether it really is in the public interest to take issue with a majority opinion, display its weaknesses, and plead for a dif-

90. *Steffan v. Perry*, 1994 WL 652249, at *1 (D.C. Cir. Nov. 22, 1994) (*en banc*).

91. *Id.* at *20 (Wald, J., dissenting).

92. See, e.g., *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994) (lesbian nurse's discharge under Army Reg. 135-175 declared violation of her constitutional rights); *Dahl v. Sec. of U.S. Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993) (discharge from Navy for admission of homosexuality declared unconstitutional). See also *Meinhold v. United States Dep't of Defense*, No. 93-56354, 1994 U.S. App. LEXIS 23705, at *31 (9th Cir. Aug. 31, 1994) (construing old regulations not to apply to admissions of homosexuality in order to avoid constitutional questions).

93. Charles Evans Hughes, *The Supreme Court of the United States* 68 (1928).

ferent result or rationale. Some judges hardly ever dissent. Some make a career out of it. Most of us fall somewhere between.⁹⁴

I do agree that dissents are not lightly to be undertaken; they strain collegial relations and, too freely indulged in, can undermine a judge's credibility with colleagues or even reviewing courts. Yet, fifteen years on an appellate court have convinced me that unanimity is not always in the public interest. Doctrine evolves as a continuing dialogue among judges and among courts, and a dissent of substance has a healthy tendency to keep the majority responsible by forcing it to confront the most difficult implications of its holding; many times the majority opinion is itself improved or refined in the process. Moreover, a dissent sends a message to other courts confronting the same issue as well as to the Supreme Court that there are two sides to the issue that must be weighed. Dissents also have currency in Congress where, in their aftermath, legislative adjustments are often sought to nullify court rulings.

I have never subscribed to the notion that it is intrinsically "better" to be a "joiner" even when one thinks the ruling is wrong and no concessions are given by the majority in an effort to cure the harm asserted by the dissenter (it is a harder question where the majority is willing to give something up for your concurrence that will make the law less wrong or limit its harmful impact). Similarly, it is difficult to justify going along in order to arrive at an admirable consensus when the judge is still convinced her own painstakingly-arrived-at view is right. These days, our law changes dramatically and rapidly in many areas, and well-considered dissents can help pave the way to tomorrow's majorities. Judges are not infallible and it is not in the public interest to advance a myth that judges gratuitously dissent out of arrogance or pettiness. The public should see us for what judges are—or should be—hardworking, caring, thoughtful, intelligent weighers of evidence and arguments dedicated not just to the rule of law but also to the rule of a law aiming at justice. We need to stay within our limits but we also have much discretion and the public needs to see how we use or abuse it. If there is basic disagreement within a court about the direction the law is taking, the public needs to know that too. That is what judging in the public interest is about.

94. In his latest book, Judge Coffin discussed the effect of dissenting and concurring opinions on judicial collegiality. Judge Coffin wrote: "In over a quarter of a century I have authored some 2300 opinions; in that period I have written only twenty-seven dissents and twenty-one concurrences. That may signal a craven yielding to a majority, but I prefer to think of it rather a testament to the efficacy of real collegial interaction in reaching a result all can accept." FRANK M. COFFIN, *ON APPEAL*, 225 (1994). Judge Coffin also defined the instances in which he believed a dissent was legitimate though, like a "broadsword," recognizing its capacity to "draw" a little blood. *Id.* at 227-29.

IV. CONCLUSION

Concluding, let me quote a provocative warning from Learned Hand about the need or the wisdom of consciously devoting one's career to serving others.

[I]f it be selfishness to work on the job one likes, because one likes it and for no other end, let us accept the odium. I had rather live forever in a company of Don Quixotes, than among a set of wraiths professing to be solely moved to the betterment of one another. . . . Let us then, if one insists on candour, do our jobs for ourselves; we are in no danger of dis-serving the State.⁹⁵

Not every great judge has agreed with Hand; Brennan, Marshall, probably Holmes, did not. Certainly my old boss on the Second Circuit and Hand's good friend in his latter years, the irrepressible reformer Jerome Frank, did not. Many of us feel the shadow of justice—however ephemeral and gossamer its shape—hovering at our side. Order and discipline, in Hand's words, "a complicated series of formulae which we impose upon the flux,"⁹⁶ does not sufficiently define what we are about. For many of us and for you I hope, too, there must be a resonance of our work in the world around us. Theory and justice must meet sometime, somewhere. Good law must improve the lot of mankind, not denigrate it. A lawyer or judge is not a pure mathematician or physicist searching only for eternal principles that already exist somewhere out there. She is a channeller of that flux Hand talked about. But—and this is the end of my simple message to you—she must be a careful and responsible channeller; good intentions will not suffice. While the law of unintended consequences visits all of our efforts, those who work in the public service or for the public interest have special obligations to try to anticipate some of those consequences and stay the course to mitigate or divert them. To take Hand's advice literally would make the ideal lawyer a kind of Alec Guinness, supervising the building of the Bridge over the River Quai with attention only to craftsmanship, oblivious of the role that bridge will serve in the greater war. We need well-built bridges, but in the right places for the right reasons. It is very hard work, and I wish you well at it.

95. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 402 (1994), reviewed by First Circuit Court of Appeals Judge Frank M. Coffin, *Reclaiming a Great Judge's Legacy*, 46 ME. L. REV. 377 (1994).

96. GUNTHER, *supra* note 95, at 402.

